

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

MARK A. ARTHUR, CIRILO MARTINEZ,  
PARI NAJAFI, and HEATHER MCCUE, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

SALLIE MAE, INC.,

Defendant.

JUDITH HARPER,

Plaintiff/Intervenor,

v.

ARROW FINANCIAL SERVICES, LLC,

Defendant.

CLASS ACTION

NO. 10-cv-00198-JLR

~~PROPOSED~~ ORDER APPROVING  
CLASS COUNSELS' MOTION FOR  
AWARD OF ATTORNEYS' FEES  
AND COSTS AND SERVICE  
AWARDS IN CONNECTION WITH  
AMENDED SETTLEMENT

1 Class Counsel's Motion For Award of Attorneys' Fees and Costs and Service Awards in  
 2 Connection With Amended Settlement ("Fee Motion") came before the Court for hearing on  
 3 September 14, 2012, pursuant to this Court's April 2 & 3, 2012 Orders granting preliminary  
 4 approval to the proposed Amended Settlement. *See* Dkt. Nos. 215, 216. The Court has read and  
 5 considered the Fee Motion, all supporting declarations and all other materials relating to the Fee  
 6 Motion.

7 **I. THE REQUESTED AWARD OF ATTORNEYS' FEES IS APPROPRIATE**  
 8 **UNDER THE PERCENTAGE-OF-THE-FUND METHOD**

9 "Attorneys' fees provisions included in proposed class action settlement agreements are,  
 10 like every other aspect of such agreements, subject to the determination whether the settlement is  
 11 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir  
 12 2003) (quoting Fed. R. Civ. P. 23(e)). Courts have the discretion to choose either the  
 13 "lodestar/multiplier" method or the "percentage" method to determine a reasonable attorneys' fee.  
 14 *Hanlon v. Chrysler Group*, 150 F.3d 1011, 1029 (9th Cir. 1998). "[U]se of the percentage  
 15 method in common fund cases appears to be dominant." *In re Omnivision Techs, Inc.*, 559 F.  
 16 Supp. 2d 1036, 1046 (N.D. Cal. 2008). By contrast, courts rely on the lodestar method under  
 17 circumstances not applicable here, *i.e.*, when "there is no way to gauge the net value of the  
 18 settlement or of any percentage thereof." *Hanlon*, 150 F.3d at 1029. As this is a common fund  
 19 case, the Court will evaluate Class Counsel's fee application pursuant to the percentage-of-the-  
 20 fund method.

21 The benchmark for an attorneys' fee award in the Ninth Circuit is twenty-five percent of  
 22 the common fund. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047-48 (9th Cir. 2002); *Torrissi*  
 23 *v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Factors that federal courts in the  
 24 Ninth Circuit use to determine the reasonableness of fees under the percentage-of-the-fund  
 25 approach include: (1) the results achieved (including results beyond the benefits of a cash fund);  
 26

(2) the risk involved with the litigation; (3) the contingent nature of the fee; and (4) awards made in similar cases. *Vizcaino*, 290 F.3d at 1048.

The Court has considered these factors and determines that the requested award of attorneys' fees and reimbursement of expenses of \$4,830,000.00—20 percent of the common fund—is appropriate. First, the Amended Settlement provides meaningful equitable and monetary relief—the largest TCPA settlement of which Class Counsel and the Court are aware—and it reflects the diligent work of skilled and experienced Class Counsel. Second, the risks involved in this litigation were notable given the evolving state of the law impacting Plaintiffs' TCPA claims and Sallie Mae's numerous potential affirmative defenses. Furthermore, by agreeing to litigate this case on a contingency basis, Class Counsel risked their own resources with no guarantee of recovery. Finally, the percentage fee requested is consistent with or lower than the fees and costs awarded in cases involving similar TCPA claims and/or similarly sized class settlements.

## **II. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF COSTS IS REASONABLE**

The Court further finds that Class Counsel's request for reimbursement of costs is also reasonable, particularly in light of the fact that Class Counsel do not seek costs in addition to the \$4.83 million requested fee. The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of class action settlement. *Staton*, 327 F.3d at 974; *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1366 (N.D. Cal. 1996). Reimbursement of reasonable costs is fully in keeping with applicable law. Throughout the course of this litigation, Class Counsel incurred out-of-pocket costs totaling \$134,114.61.<sup>1</sup> Based on a review of Class Counsel's expense reports, the Court is satisfied that the requested costs are relevant to the litigation and reasonable in amount.

<sup>1</sup> See Selbin Decl. ¶¶ 65-66, Ex. C; Terrell Decl. ¶ 16, Ex. B; Wilson Decl. ¶ 7, Ex. C; Swigart Decl. ¶ 8, Ex. B; Kazerounian Decl. ¶ 8.

### 1 **III. SERVICE AWARDS FOR THE NAMED PLAINTIFFS ARE APPROPRIATE**

2 Plaintiffs request combined service payments of \$7,500.00, consisting of \$2,500.00  
 3 payments to the Mark Arthur, Cirilo Martinez, and Pari Najafi. The trial court has discretion to  
 4 order service awards to be paid to class representatives. *In re Mego Fin'l Corp. Sec. Litig.*, 213  
 5 F.3d 454, 463 (9th Cir. 2000); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329 (W.D.  
 6 Wash. 2009). Here, the record indicates that Plaintiffs Arthur, Martinez, and Najafi contributed  
 7 to the litigation by: (1) assisting counsel with the preparation of the complaints and amended  
 8 complaints; (2) producing relevant documents and responding to other informal written  
 9 discovery; (3) staying abreast of the multiple rounds of settlement negotiations; (4) reviewing the  
 10 (original and amended) settlement terms; and (5) preparing and submitting declarations to the  
 11 Court.<sup>2</sup> The Court finds these contributions to the litigation and settlement process sufficient to  
 12 warrant the requested Service Awards. When compared to service awards in other cases, the  
 13 \$2,500 payments requested here are justified.<sup>3</sup>

14 \* \* \*

15 The Court having considered all papers filed and proceedings had herein, and otherwise  
 16 being fully informed, and good cause appearing therefore,

#### 17 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:**

18 1. This Court hereby finds and concludes that due and adequate notice has been  
 19 directed to all persons and entities who are Class Members as required in this Court's April 3,  
 20 2012 (Dkt. No. 216), advising them of Class Counsel's intent to seek attorneys' fees and costs  
 21 and Service Awards, and of their right to object thereto.<sup>4</sup>

22 <sup>2</sup> See Declarations of Mark Arthur, Cirilo Martinez, and Pari Najafi.

23 <sup>3</sup> See *Pelletz*, 592 F. Supp. 2d at 1329-30 & n.9 (approving \$7,500 service awards and  
 24 collecting decisions approving awards ranging from \$5,000 to \$40,000); *Grays Harbor Adventist*  
 25 *Christian Sch. v. Carrier Corp.*, 2008 U.S. Dist. LEXIS 106515, at \*16 (W.D. Wash. Apr. 24,  
 26 2008) (approving \$3,500 awards).

<sup>4</sup> See generally Declaration of Jennifer Keough.

1           2.     A full and fair opportunity was accorded to all such persons and entities to be  
2 heard with respect to the Fee Motion.

3           3.     The Court hereby grants Class Counsel's request for fees in the amount of  
4 \$4,830,000.00. That award amounts to 20 percent of the common fund, less than the 25 percent  
5 benchmark. When Class Counsel's expended costs of \$134,114.61 are deducted, the remaining  
6 fee approximates 19% of the common fund.

7           4.     In addition to any relief they may receive under the Amended Settlement  
8 Agreement, the Court approves payment of a \$2,500.00 incentive payment to Mark Arthur, Cirilo  
9 Martinez, and Pari Najafi.

10          5.     The awarded attorneys' fees and costs shall be paid pursuant to the terms,  
11 conditions and obligations of the Amended Settlement Agreement, which provides for payment to  
12 an escrow account in three tranches. The payment of the awarded fees and costs is conditioned  
13 on the Stipulated Undertaking for Repayment of Attorneys' Fees and Costs, which has been  
14 signed by the parties and was approved by this Court on April 3, 2012.

15          6.     The awarded fees and expenses shall be directed to Class Counsel for distribution  
16 in a manner that reflects each firm's contribution to the initiation, prosecution and resolution of  
17 this litigation. The Court authorizes the Class Counsel firm of Lieff Cabraser Heimann &  
18 Bernstein, LLP to allocate the fee award among the Plaintiffs' firms.

19     \\

20     \\

21     \\

22     \\

23     \\

24     \\

25     \\

26

1           7.       Without affecting the finality of this Order, the Court reserves continuing and  
2 exclusive jurisdiction over parties to the Amended Settlement Agreement to settle any disputes  
3 related to the allocation of the costs and fees awarded by this Order.

4           IT IS SO ORDERED.

5  
6 Dated: September 17, 2012



The Honorable James L. Robart  
United States District Judge